IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

DONJA SEAWELL,
on behalf of herself and
all others similarly situated
Plaintiff,

v.

UNIVERSAL FIDELITY
CORPORATION,
Defendant.

Civil Action No. 05-479

MEMORANDUM/ORDER

This case, filed on February 2, 2005, is a consumer class action under the Fair Debt Collection Practices Act, 15 U.S.C. § 1692, *et seq.* The Fair Debt Collection Practices Act is designed to prevent debt collectors from using abusive, deceptive, or unfair collection practices. *Id.*

In her complaint, Donja Seawell alleges that defendant, Universal Fidelity Corp. (UFC), sent her a collection notice by U.S. Mail on or about September 24, 2004. The basis of her claim is that the letter was on letterhead that "contained the language 'Administrative Office - Record of Notification' and also depicted an American flag in the left hand corner of the letterhead." Def's Mem. at 1. Seawell alleges that defendant's

use of the letterhead caused her to believe that the United States government approved the letter, in violation of the FDCPA's provision prohibiting "[t]he false representation or implication that the debt collector is vouched for, bonded by, or affiliated with the United States or any State, including the use of any badge, uniform, or facsimile thereof." 15 U.S.C. § 1692e(1). The class, comprised of at least 321 consumers who received similar letters, was certified on March 6, 2006. *See* Order of March 7, 2006 (docket # 26).

A debt collector found to be in violation of the Act is liable for monetary damages. The statute's damages provision reads as follows:

> Except as otherwise provided by this section, any debt collector who fails to comply with any provision of this subchapter with respect to any person is liable to such person in an amount equal to the sum of—
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> (1) any actual damage sustained by such person as a result of such failure;
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> (2)(A) in the case of any action by an individual, such additional damages as the court may allow, but not exceeding $1,000; or
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> (B) in the case of a class action, (i) such amount for each named plaintiff as could be recovered under subparagraph (A), and (ii) *such amount as the court may allow for all other class members, without regard to a minimum individual recovery, not to exceed the lesser of $500,000 or 1 per centum of the net worth of the debt collector*;
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> (3) in the case of any successful action to enforce the foregoing liability, the costs of the action, together with a reasonable attorney's fee as determined by the court. On a finding by the court that an action under this section was brought in bad faith and for the purpose of harassment, the court may award to the defendant attorney's fees reasonable in relation to the work expended and costs.

15 U.S.C. § 1692k(a) (emphasis added).

On April 24, 2006, UFC filed a motion for partial summary judgment under Federal Rule of Civil Procedure 56(c) (docket # 28). In its motion, UFC points out that there is some disagreement within the courts as to what "net worth" means in § 1692k(a)—namely, whether it should be calculated as "book value" pursuant to the Generally Accepted Accounting Principles (GAAP), or whether it should be read to include equity, capital stock, and good will. *Compare Sanders v. Jackson*, 209 F.3d 998, 999 (7th Cir. 2000) (holding that "net worth" should be calculated in accordance with GAAP based on the "book value of the company, that is, assets listed on the company's balance sheet minus liabilities, which is sometimes called balance sheet net worth"), *with Wisneski v. Nationwide Collections, Inc.*, 227 F.R.D. 259, 261 (E.D. Pa. 2004) (including "equity, capital stock, and goodwill into the calculation of a company's net worth . . ."). Based on these differing views, UFC asks for summary judgment that "as a matter of law . . . the definition of net worth does not include equity, capital stock[,] and good will." Def.'s Mem. at 9. It additionally requests that this court hold, again as a matter of law, that the maximum amount of statutory damages that can be award is $3550.00.[1] *See id.* at 2. Defendant contends that $3550.00 represents 1% of UFC's net worth, based on a December 2005 audit. *See* Def.'s Mem. at 2.

[1] In its draft order, defendant uses blanket language that "[t]he maximum amount that can be awarded to the class is $3,550.00." Def.'s Draft Order. However, I take this figure to encompass only its estimate of class-based statutory damages available under 15 U.S.C. § 1692k(a)(2)(B)(ii), and not to include actual damages under § 1692k(a)(1), individual damages for the named plaintiff under § 1692k(a)(2)(B)(i), attorney's fees under § 1692k(a)(3), or any other relief available to the class. *See* Pl's. Opp. at 9.

Plaintiff responds that there is no dispute between the parties about how net worth is to be calculated. *See* Pl.'s Opp. at 9 (docket # 48) ("Defendant would like to bait Plaintiff into a debate of 'book value' vs. 'market value' net worth . . . . That distinction, however, is not the issue in this case."). Seawell contends that the real issue is "whether several of Defendant's alleged 'liabilities' (which drive down net worth) are actually 'assets' in disguise." *Id.* She argues that UFC has taken "actions to purposefully keep its net worth, and thus its FDCPA exposure, artificially low," such as "unexplained expenses" on defendant's books. *Id.* at 5, 6. Plaintiff opposes summary judgment on the grounds that it is too early to consider the measure of statutory damages to be awarded in the case and that there are disputes of material fact regarding defendant's net worth.

As the parties' submissions reflect, there are two distinct disputes on damages (one of which, indeed, may not be a dispute at all). The first is how "net worth" should be calculated under the FDCPA, and the next is, based on the governing interpretation of net worth, what UFC's exposure to statutory liability will be. I find that summary judgment is inappropriate on either issue at this time. Accordingly, for the reasons explained herein, I will deny defendant's motion.

The opening phrase of 15 U.S.C. § 1692k(a) states that "any debt collector who fails to comply with any provision of this subchapter . . . is liable to such person," thus signifying that, in order to reach the damages issue, the defendant debt collector must first be found *liable* under the statute. *Cf. Cusumano v. Maquipan Int'l, Inc.*, 390 F. Supp. 2d

1216, 1222 (M.D. Fl. 2005) (holding that summary judgment on defendant's "good faith" defense to liquidated damages was premature because liability had not yet been established). In the instant case, no such finding of liability has been made, thereby rendering any determination of statutory damages at this stage purely speculative.

As a general matter, courts that have considered the issue of net worth under the FDCPA have done so at a point in the litigation when liability was no longer at issue. *See Sanders v. Jackson*, 33 F. Supp. 2d 693, 694 (N.D. Ill. 1998) ("The parties have settled all issues involved in the case except for the issue of the putative class's statutory damages as measured by 1% of UFC's net worth."), *aff'd* 209 F.3d 998 (7th Cir. 2000); *see also Saunders v. Berks Credit & Collections, Inc.*, 2002 WL 1497374, at *11 (E.D. Pa. 2002) (discussing net worth in the context of approving a tentative settlement of the class action); *Fry v. Hayt, Hayt & Landau*, 198 F.R.D. 461, 470 (E.D. Pa. 2000) (same). *Cf. Wisneski*, 227 F.R.D. at 261 (discussing net worth in the context of whether a proposed class action is the superior method of adjudicating the matter under the statutory recovery scheme).[2] Unless and until the issue of liability is resolved (either via summary judgment,

[2] In its reply brief, defendant contends that knowing how the court will calculate statutory damages is critical to its assessment of whether or not to settle the case. *See* Reply Br. at 4 ("Nevertheless, it is impossible for Defendant to determine any potential settlement until it knows the potential range of statutory damages it may face."). There is some merit to this point, and at least one court has been willing to grant summary judgment on the issue of damages where both parties agree it would be integral to settlement negotiations. *See United States ex rel. Taylor v. Gabelli*, 2005 WL 2978921, at *2, n.2 (S.D.N.Y. 2005) ("The parties believe that resolution of Defendants' pending motion for partial summary judgment on damages will have a significant impact on

trial, or settlement), I will not entertain disputes over how damages will be calculated.

Defendant additionally asks that I rule, as a matter of summary judgment, that "damages to the class is capped at $3,550.00." Def.'s Mem. at 2. Even if summary judgment as to the method of calculating damages were appropriate, this court is in no position to calculate the actual amount of damages in this case. First, there are disputes of material fact concerning possible divestiture of defendant's assets that assertedly might

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settlement discussions." (internal quotations and citations omitted)).

Gabelli was a *qui tam* action under the False Claims Act, in which the relator claimed that the profits defendant had realized from his false claims should be factored into the statutory damages. *Id.* at *1. Defendant sought partial summary judgment on whether such damages were available under the statute. Both parties agreed that partial summary judgment was the best vehicle to resolve the issue, which was one of statutory interpretation. *See id.* at *2, n.2 *see also id.* ("'The parties agree . . . that certain Defendants profited from the license sales . . . , and that the issue of whether sales profits are allowable as a measure of FCA damages is amenable to summary judgment.'" (citations omitted)).

Gabelli is distinguishable, however, because, in that case, both parties agreed that partial summary judgment on the issue of damages was proper. *See id.* ("Both parties agree there are no material factual issues and the question before the Court is strictly one of statutory interpretation: does the FCA grant *qui tam* relators the remedy of disgorgement of profits?"). By contrast, the parties to the instant action are not in agreement that summary judgment is the proper way of resolving the issue—namely, plaintiff Seawell opposes defendant's partial summary judgment motion as premature.

Moreover, summary judgment in *Gabelli* concerned a claim for disgorgement of profits worth between $408 and $618 million dollars, whereas the potential dispute over class-based damages in this case does not exceed $500,000. *See* 15 U.S.C. § 1692k(a)(2)(B)(ii) ("[Liability in the case of class members is] such amount as the court may allow for all other class members, without regard to a minimum individual recovery, not to exceed the lesser of $500,000 or 1 per centum of the net worth of the debt collector . . . ."). The comparative lack of a significant monetary dispute in this case militates against using the summary judgment device in its non-native setting. *See* Fed. R. Civ. P. 56 (summary judgment primarily concerned with adjudicating "claims").

undervalue the company's net worth. Pl.'s Opp. at 5–7, 9. Next, it is well established that a defendant's net worth is calculated at the time of settlement/resolution of the case, rather than when the violation occurred. *See Bonett v. Educ. Debt Servs.*, 2003 WL 21658267, at *7, n.4 (E.D. Pa. 2003). Defendant's $3550 figure is based on records from December 2005, more than a year ago, and therefore cannot set the appropriate basis for determining damages.

AND NOW, this 2nd day of April, 2007, upon consideration of defendant Universal Fidelity Corp.'s Motion for Partial Summary Judgment, plaintiff's opposition thereto, defendant's reply thereto, and plaintiff's surreply thereto, it is hereby ORDERED that defendant's motion is DENIED.

BY THE COURT:

/s/ Louis H. Pollak
Pollak, J.